Great Scot, Inc. *and* United Food and Commercial Workers Union Local 954, AFL–CIO–CLC. Case 8–CA–21382

November 24, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issues presented in this case are whether the Respondent violated Section 8(a)(1) of the Act by (1) denying the Union access to its property by requesting union handbillers to leave its property and by calling the police to remove the handbillers; and (2) by maintaining a state court trespass action against the Union.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. THE ACCESS ISSUE

The judge, applying the analysis set forth by the Board in *Jean Country*, 291 NLRB 11 (1988), concluded that the Act entitled the Union to station its handbillers on the Respondent's property near the entrance to the store. He therefore found that the Respondent violated Section 8(a)(1) of the Act by calling the police to remove the handbillers. The judge, however, found that the Respondent did not violate the Act by requesting the handbillers to leave the Respondent's property because he concluded that a mere request did not constitute interference, restraint, or coercion.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act when its store manager asked the police to remove the handbillers from the store's property and further find, contrary to the judge, that the Respondent violated Section 8(a)(1) by requesting the handbillers to leave the store's property. As explained below, we base these findings, however, on the Respondent's disparate treatment of union activity.[2]

A. *Facts*

The facts are undisputed. The Respondent operates a Great Scot supermarket in Port Clinton, Ohio. The store property includes a 100-car parking lot.[3] The portion of the parking lot immediately in front of the store's entrance is marked as a no-parking area. This area runs for about 15 to 20 feet along the front of the store, and customers walk through this area on their way into and out of the store. Several vending machines are located in this area, and seasonal items, such as firewood and gardening supplies, are often displayed.

During the period from Friday, October 28, through Wednesday, November 2, 1988,[4] two members of the Union's staff handbilled in the parking lot near the store's entrance. Two other staff members picketed on public property at an entrance to the parking lot. The handbills requested customers not to shop at the Respondent's nonunion store and to patronize certain named unionized stores instead. At no time did the handbillers block the entrance to the store. On or about Saturday, October 29, Ronald Rutkowski, the store manager, approached the handbillers and requested them to leave the vicinity of the store. Rutkowski also requested that the pickets be removed.[5] The handbillers and pickets refused to move. Sometime later that weekend, Rutkowski called the police. After consulting with Rutkowski, the police told the handbillers that the store manager wanted them off the property. The police stated, however, that they would not act against the handbillers without a court order.

On November 2, the Respondent commenced a trespass action in the Court of Common Pleas, Ottawa County, Ohio, against the Union, concurrently seeking a temporary restraining order (T.R.O.) and a preliminary injunction. On the same date, after a hearing, the court issued a T.R.O. prohibiting the Union from trespassing on the store's premises and limiting the Union's picketing and handbilling in the vicinity of the

[1] On May 30, 1991, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel, Respondent, and the Union each filed exceptions and a supporting brief. The Respondent filed a supplemental brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] Subsequent to the issuance of the judge's decision, the Supreme Court, in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), held that the Board's accommodation analysis in *Jean Country*, as applied to nonemployee organizational trespassing, is inconsistent with the Court's interpretation of Sec. 7 of the Act as set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). The *Lechmere* decision does not, however, disturb the Court's statement in *Babcock & Wilcox*, 351 U.S. at 112, that an employer's right to ''post his property against nonemployee distribution of union literature'' is limited to circumstances in which the employer's ''notice or order does not discriminate against the union by allowing other distribution.'' In apparent recognition of the continued viability of the disparate treatment rationale for finding a denial of access to be unlawful, the Court in *Lechmere* noted (fn. 1) that Lechmere consistently enforced its [no-access] policy against, among others, the Salvation Army and the Girl Scouts. See also *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978).

[3] The Respondent's store and parking lot are located at the intersection of a street and a paved thoroughfare which is an easement from the Respondent to a neighboring lumber yard for truck access. This easement, however, is not exclusively used by the lumber yard or the Respondent. Members of the public often drive over it for purposes unrelated to either business. The parking lot is unfenced, and uncurbed sidewalks separate the lot from both the easement and the street.

[4] All dates are in 1988 unless otherwise noted.

[5] The General Counsel does not attack this request that pickets leave the public property on which they stand. Accordingly, we find no violation in this respect.

store to four persons on public property next to the main entrance to the parking lot.[6] The Union filed its unfair labor practice charge on November 3, and sought dismissal of the state court action on preemption grounds. By order dated December 12, the court granted a preliminary injunction, continuing the restrictions imposed by the T.R.O.. The court did not address the preemption question.

On April 26, 1989, the complaint in the instant case issued. On January 30, 1991, following waiver by both parties of a hearing, the court issued an order converting the T.R.O. into a permanent injunction, restraining the Union ''from trespassing on [the Respondent's] property or otherwise interfering in any way with [the Respondent's] business.''

At all relevant times, the Respondent has permitted other organizations and individuals to use its property, free of charge, to solicit contributions and sell items. Each year, the Respondent allows about a half-dozen charitable and civic organizations, such as the Port Clinton High School Band Boosters, to use the area near the store entrance for fund raising purposes. These events generally occur over several days, lasting between 3 and 6 hours each day. Along with these nonprofit fund-raising events, the Respondent has allowed individuals to use the parking lot for commercial ventures. Several nonemployee food vendors were regularly permitted access to the area in front of the store.

B. *Analysis*

On these facts, we apply a ''disparate treatment'' analysis, rather than the accommodation analysis used by the judge and later rejected in *Lechmere*, supra. In *Jean Country*, the Board noted its continued adherence to the distinct analytical view that a denial of access for Section 7 activity may constitute unlawful disparate treatment when a property owner permits other activity in similar circumstances. 291 NLRB at 12 fn. 3. In *D'Alessandro's, Inc.*, 292 NLRB 81 (1988), the Board found a violation of Section 8(a)(1) where the respondent permitted use of its parking lot for a wide range of commercial and charitable activity unrelated to the operation of its store, but prohibited union activity.

In the instant case, the Respondent has routinely allowed other organizations, both commercial and nonprofit as described above, to use its parking lot for activity unrelated to its store. The Respondent admits that at least six different civic organizations have used the part of the parking lot near the store's entrance for fund raising. These civic fundraising events occur from time to time throughout the year. The Respondent also permits at least two nonemployee food vendors to set up portable wagons for the sale of ribs, barbecue, and egg rolls. Although one of the food vendors purchased some of his supplies from the Respondent, the Respondent did not receive a share of the profits from either vendor. Under these circumstances, we find that the Respondent's conduct constituted unlawful disparate treatment of protected union activity, in violation of Section 8(a)(1) of the Act.[7]

We further find that the Respondent violated Section 8(a)(1) of the Act by requesting the handbillers to leave its property. The judge drew a distinction between this case in which the Respondent merely asked the handbillers to stop their activity and prior Board cases in which the request to stop was accompanied by a threat, such as calling the police. We do not agree that this is a meaningful or logical distinction. Section 8(a)(1) is not confined to coercive acts such as threats. Rather, the Section also covers acts of interference and restraint. In the instant case, Respondent sought to interfere with and indeed to stop (restrain) a Section 7 activity. In these circumstances, we find an 8(a)(1) violation. In any event, we note that the Respondent's store manager did in fact summon the police shortly after requesting that the handbillers stop their activity, and, in these circumstances, the store manager's request cannot be viewed in isolation from his subsequent conduct.[8]

II. THE LAWSUIT ISSUE

With regard to the Respondent's trespass action, the judge, applying the Board's decision in *Giant Food Stores*, 295 NLRB 330 (1989), concluded that the Respondent did not violate the Act by either instituting or maintaining its successful state court action. The General Counsel and the Union filed exceptions, arguing that the Respondent unlawfully maintained its state court action.

Subsequent to the judge's decision, the Board issued its decision in *Loehmann's Plaza*, 305 NLRB 663

[6] The Union also picketed and handbilled the store on two weekends in November 1988, approximately six times in 1989, and twice in 1990. At all times, this activity was carried out in a manner that complied with the temporary restraining order obtained by the Respondent.

[7] In its brief, the Respondent notes that it limits access to its premises to business invitees, and that no organization, regardless of purpose, has ever been permitted to engage in any kind of activity on the Respondent's property without its prior approval. However, the record does not establish any such policy. Nor does the record support the notion that the Union would have been granted access if it had been asked. To the contrary, the record indicates that the Respondent, in deciding which organizations are permitted access, has no set standard or policy. The store manager simply decides on his own whether to allow a given activity. Further, there was no evidence that any other organizations were denied access to the Respondent's premises. Rather, it appears that the Respondent granted access to outside individuals and organizations for a broad range of activities, but singled out union activity for proscription.

[8] We shall amend the judge's remedy and cease-and-desist provision of his recommended Order to conform to our traditional remedy for these violations.

(1991), finding that once a complaint issues alleging the unlawful exclusion of employees or union representatives from the employer's property, any state court action concerning the same activity is preempted and the continued pursuit of such a lawsuit violates Section 8(a)(1) of the Act. As noted above, on April 26, 1989, the General Counsel issued the instant complaint alleging that the Respondent violated Section 8(a)(1) by interfering with the Union's peaceful handbilling. The Respondent did not thereafter seek to have the injunction withdrawn, and, in fact, a permanent injunction was granted. We, therefore, find that the Respondent violated Section 8(a)(1) by its continued maintenance of the state court lawsuit after the complaint in this proceeding issued on April 26, 1989.

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist and take certain affirmative action that will effectuate the policies of the Act.

We shall further order the Respondent to seek to have the injunction obtained against the Union's picketing and handbilling withdrawn. In addition, in order to place the Union in the position it would have been in absent the Respondent's unlawful conduct, we shall order the Respondent to make the Union whole for all legal expenses, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), incurred in the defense of the Respondent's lawsuit after the April 26, 1989 issuance of the complaint in this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Great Scot, Inc., Port Clinton, Ohio, its officers, agents, successors, and assigns, shall

1. Substitute the following for paragraph 1(a).

''(a) Discriminatorily prohibiting the representatives of United Food and Commercial Workers Union, Local 954, AFL–CIO–CLC from distributing handbills in front of its store in Port Clinton, Ohio, by requesting that they leave the store's premises and by calling the police to remove them.''

2. Insert the following as paragraph 1(b) and reletter the subsequent paragraph accordingly.

''(b) Prosecuting its state court lawsuit, giving effect to the permanent injunction granted by the Court of Common Pleas, Ottawa County, Ohio, on January 30, 1991, or, after any complaint issues alleging interference with peaceful protected picketing or handbilling, filing, or maintaining a lawsuit seeking to enjoin such protected activity.''

3. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs accordingly.

''(a) Seek to have the permanent injunction, described above, obtained against the Union's peaceful handbilling, withdrawn.

''(b) Reimburse the Union for all legal expenses, plus interest, incurred in the defense of the Respondent's lawsuit after the April 26, 1989 issuance of the complaint in this proceeding.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily prohibit representatives of the United Food and Commercial Workers Union, Local 954, AFL–CIO–CLC from distributing handbills in front of our store by requesting that they leave the store premises and calling the police to remove them.

WE WILL NOT prosecute our state court lawsuit, give effect to the permanent injunction granted by the Court of Common Pleas, Ottawa County, Ohio, on January 30, 1991, or, after any complaint issues alleging interference with peaceful protected handbilling, filing, or maintaining a lawsuit seeking to enjoin such protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL seek to have the permanent injunction against the Union's peaceful handbilling, as granted by the Court of Common Pleas, Ottawa County, Ohio, withdrawn.

WE WILL reimburse the Union for all legal expenses, plus interest, incurred in the defense of our lawsuit to enjoin the Union's peaceful handbilling after the April 26, 1989 issuance of the complaint in the instant proceeding.

GREAT SCOT, INC.

Nancy Butler, Esq., for the General Counsel.
J. Michael Kota, Esq. (Bricker & Eckler), of Columbus, Ohio, and *Michael Cheek, Esq.*, of Clearwater, Florida, for the Respondent.
Joan Torzewski, Esq. (Lackey, Nusbaum, Harris, Reny & Torzewski), of Toledo, Ohio, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent operates a ''Great Scot'' supermarket in Port Clinton, Ohio. (I will generally refer to that supermarket as ''the store.'') During the period Friday, October 28, through Wednesday, November 2, 1988, four members of the staff of UFCW Local 954 (the Union), at the direction of the Union, picketed and handbilled at the store. The two handbillers stationed themselves on the store's property, 15 feet or so from the store's only entrance. The other two staff members, who remained on public property, picketed next to the main vehicular entrance to the store's parking lot.

Sometime during the weekend of October 29–30 the store's manager asked the handbillers and the pickets to leave. But all four stayed where they were. (Some of the time the Union had only one handbiller and one picket on station. But the record does tell us exactly when the Union had four of its agents at the store, and when it had only two or three. In any case, for purposes of my decision the variation between two and four is inconsequential.)

Later that weekend the store's management asked the Port Clinton police to remove the handbillers from the store's property. The police spoke briefly with the handbillers and pickets but took no action against them.

On November 2, the Respondent obtained a temporary restraining order from a local court that enjoined the Union from trespassing on the store's premises and limited the number of pickets and handbillers that the Union could place on public property near the store. The Union complied with the court's order.[1]

According to the General Counsel, the Respondent violated the National Labor Relations Act (the Act) on three occasions. The first was when the store manager ''refus[ed] to permit handbilling in the area of the entrance to the store'' and when the manager ''request[ed] that the pickets and handbillers leave the Respondent's property.'' The second was when the store manager ''summoned the police in an effort to have the handbillers removed from the area of the entrance to the store.'' And the third was when Great Scot began, and then maintained, its court action against the Union in respect to the handbilling and picketing.[2]

My conclusion is that the Respondent violated Section 8(a)(1) of the Act when its store manager asked the police to remove the handbillers from the store's property but that the Respondent did not otherwise violate the Act.

The Union's Actions

Port Clinton is served by four supermarkets. The Union represents the employees at two of the stores—Kroger and Foodtown. The other two—IGA and Great Scot—are not unionized.

On October 28, 1988, two persons began passing out handbills, on behalf of the Union and at its direction, in front of the Great Scot store. The handbills read (with capitalization and boldface in the original):

STOP
PLEDGE DON'T SHOP
GREAT SCOT-PORT CLINTON

Great Scot, Port Clinton, is part of a ''doublebreasted'' union-busting company owned and operated by CWC Companies, Inc. (Carrol W. Cheek), headquartered in Findlay, Ohio. They operate, among others, the Great Scot Supermarkets in Findlay and Fremont, Ohio.

The Findlay and Fremont stores are protected by a Union Contract and have been for 20 years or more. After many years of labor/management cooperation and healthy growth, CWC, Inc. started getting ''seedy & greedy.'' They decided to use profits generated by hardworking Union members at their store in Findlay and Fremont, and opened a non-Union, low wage Great Scot Store in Port Clinton, as well as non-union, Sack'N Save's in other cities.

This Union buster's objective: Bust this area's wage and benefit standards and maximize profits—the hell with the rights of working men and women.

We ask working men and women in Northwest Ohio to shop elsewhere until this company agrees to pay the wage and benefit standards of our community.

Please shop the Union stores in this area . . . Food Town and Kroger.

Thank you,
UFCW Local No. 954, AFL–CIO
United Food & Commercial Workers

The handbillers were wearing aprons that had printed on them, in large lettering:

[1] The Union additionally picketed and handbilled the store on two weekends in November 1988, approximately six times in 1989, and twice in 1990 (at all such times in a manner that complied with the T.R.O.).

[2] The Union filed its charge on November 3, 1988. The complaint issued on April 26, 1989. Great Scot has admitted that it is an employer engaged in commerce and that the Union is a labor organization. But the Respondent denies that it violated the Act in any respect. I heard the matter in Port Clinton on January 31, 1991. The General Counsel, the Union and the Respondent have filed briefs.

THIS COMPANY HAS
SUBSTANDARD TERMS
OF EMPLOYMENT
PUBLIC SERVICE OF UFCW
LOCAL 954

A diagram of the store, the surrounding property, and the location of the handbillers, is set out in Appendix A. As the diagram indicates, the store fronts on a parking lot. A small area on the parking lot about 15 to 20 feet from the entrance to the store is marked as a no-parking area. The store's customers invariably walk through or next to that area on the way to entering the store and again when they leave it. The handbillers stationed themselves in that area.

At no time did the handbillers block the ingress or egress of anyone to or from the store. The handbillers were under instructions to behave peacefully and courteously, and the Respondent does not claim that they behaved otherwise.

Most of the time the persons who did the handbilling were paid members of the Union's staff. According to a union witness, ''we did have some volunteers from the Union stop by on a sporadic basis.'' The ''volunteers,'' in turn, were retired members of the Union and the like. At no time did any of the store's employees participate in the handbilling.

At the same time the handbilling began, two other persons began picketing the Great Scot store (again, at the Union's direction), doing so on public property on the corner of Monroe Street and Perry Street, next to the main entrance to the parking lot. The pickets were wearing aprons with the same markings as the handbillers'. The pickets were, like the handbillers, members of the Union's staff or, occasionally, volunteers.

The signs the pickets carried read:

GREAT SCOT/PORT CLINTON
NOTICE
TO THE
PUBLIC
PLEASE
DON'T SHOP;

THIS STORE PAYS ITS EMPLOYEES WAGES AND FRINGE BENEFITS WHICH ARE FAR BELOW THOSE PAID TO UNIONIZED GROCERY STORE EMPLOYEES IN THE AREA. THIS COMPANY IS ATTEMPTING TO DESTROY OUR HIGHER UNION STANDARDS.

UFCW NORTHWEST OHIO
AFL–CIO–CLC
UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 954

As was the case with the handbillers, the pickets did not block ingress or egress, and no one contends that the pickets were anything but peaceful and courteous.

The Respondent's Response to the Handbilling and Picketing

Ronald Kutkowski is the store's manager. During the weekend of October 29–30 Rutkowski asked the handbillers and pickets to leave the vicinity of the store. According to the unrebutted testimony of Union Staff Member David Sadowski, Rutkowski—

> approached us and asked us to vacate the premises totally. He asked us not only to remove the handbillers but also to pull the picket off [who] was on the easement [i.e., public property] at the Monroe Street location.[3]

The handbillers and picket refused to move.

Again according to Sadowski's unrebutted testimony, later that weekend—

> the police, Port Clinton Police, did approach us. They had gone in and talked to the store manager and the officer involved approached me specifically, told me that the store manager . . . wanted us off the property but he [the police officer] felt that they [the store's management] would have to go to court in order to do this. He advised us to be peaceful and obey the necessary laws, regulations, et cetera. We went over it with him and he left the area.
>
> Subsequent to that, the police cruised by on other occasions while we were there and we never had any further close contact with them.

The final series of events of concern to us here occurred in the Ottawa County, Ohio Court of Common Pleas.

On November 2 the Respondent there began a trespass action against the Union and moved for a temporary restraining order (T.R.O.). On that game day, after hearing argument, the court issued a T.R.O. that prohibited the Union from trespassing on the store's premises and limited the Union's picketing and handbilling in the vicinity of the store to four persons on public property next to the main entrance to the store's parking lot.

The Ottawa County court subsequently issued a preliminary injunction, embodying the same terms as the T.R.O., and then, on January 30, 1991, a permanent injunction.

The Protected Nature of the Handbillers and Pickets Activity

The Board time after time has held that activity precisely like the Union's here is within the protection provided by Section 7. In *Jean Country*, for example, the union's agents asked—

> passersby to shop at . . . nearby stores with similar merchandise that had collective-bargaining relationships with the Union. It is thus apparent that the Union's picketing was conducted at least in part on behalf of the unionized employees of those stores that were in competition with the nonunion Jean Country store. Although such conduct has lesser significance in the scheme of Section 7 than direct organizational solicitation or the protestation of unfair labor practices at the situs of the primary employer, it is, nevertheless, undertaken for the ''mutual aid or protection'' of employees

[3] See also Jt. Exh. 7, in which the parties stipulated that ''the Union's pickets were asked to leave Great Scot's premises'' by Rutkowski.

and is clearly protected by Section 7. (291 NLRB 11 at 17 (1988).)[4]

The Respondent argues that ''there is no evidence'' establishing ''that Great Scot's Port Clinton wages and benefits are substandard,'' and that ''there is also no evidence establishing a uniform area standard against which Great Scot's wages and benefits can be compared.'' (Br. at 12.)

I will assume, for present purposes, that if the record showed that the wages and benefits received by the Great Scot employees were not ''substandard,'' then the Union's handbilling and picketing would not be protected by Section 7. (Although, perhaps, the question ought to be whether the Union's claims were not made in good faith.)[5] But it would appear that the burden of proof on this matter rests with the Respondent, not was contended by the Respondent) with the General Counsel or the Union. That is, it was up to the Respondent, in order to support its contention that the Union's activity was unprotected by reason of the untruth of the Union's area standards claims, to prove that the remuneration received by the store's employees was as high as that received by the employees of the unionized Foodtown and Kroger stores in Port Clinton. Respondent made no such showing.

The Respondent's Property Interests

As the diagram in appendix A shows, the property in question is the Great Scot store itself and a 100-car parking lot that fronts the store. (The only door for customers is in the front of the store. Thus customers—whether in vehicles or on foot—must cross the parking lot when entering and leaving the store.) Respondent holds a leasehold interest in the property.

It is in the Respondent's interest, of course, to attract as many potential customers as possible to the store. The store/parking lot arrangement is designed to do that. There is no charge for parking on the lot. No walls of any kind surround the property. There are numerous entrances onto the parking lot. Respondent does not station any employees outside the store to ensure that persons entering the parking lot in vehicles or on foot are in fact headed for the store. And sometimes people with no intention of shopping at the Great Scot store do park on the store's lot.

On the other hand, the general arrangement of the parking lot makes it clear that the lot ''belongs'' to the store (and to a Goodyear facility that adjoins the store; I will discuss that facility later). A sign on the lot states ''parking only for Great Scot customers, violators will be towed.'' And from time to time store employees do take steps to prevent the parking lot from being used for purposes other than parking while shopping in the store.

Also, Respondent sometimes uses the lot for marketing purposes. For example, from time to time in the summer months the Respondent has covered part of the parking lot with a tent and used the tented area as a kind of extension of the store. And the Respondent routinely uses the area next to the store itself, near the store's entrance, as a vending machine area and to display bulk items, such as firewood and bags of peat moss.

What looks much like a city street runs east to west just north of the store. In fact it is part of the store's leasehold interest. But because of the appearance of that part of the property, I will here refer to it ''Perry Street Extended'' (as I did during the hearing). A lumberyard north of Perry Street Extended owns an easement allowing its trucks to travel over that part of the store's property. And on occasion members of the public drive on Perry Street Extended for purposes unrelated to the Great Scot store. There is no barrier between Perry Street Extended and the parking lot, and many of the store's customers enter the parking lot via Perry Street Extended.

Focusing on the area where the handbillers stationed themselves, near the entrance to the store, that area is marked as a no-parking area, in order to keep the area clear for customers entering and leaving the store. Because of the no-parking markings, the proximity of the store itself, and the goods for sale stacked nearby, the area is self-evidently intended for the sole use of Respondent's employees and persons entering or leaving the store.

A Goodyear retail facility adjoins the store, to the south. (Standing in the parking lot facing the front of the store, the Goodyear facility is to the left.) Goodyear subleases the property from the Respondent. Goodyear's customers use the same parking lot as Great Scot's. While as a matter of their own convenience the Goodyear customers presumably tend to park in front of that facility (rather than next to the Great Scot store), they are not required to do so, nor are there even any markings on the parking lot encouraging them to do so.

In sum, on the one hand the Respondent possesses a ''legitimate'' and significant property interest in the Great Scot store and in the parking lot. *Best Co.*, supra. And that interest is particularly strong in respect to the area where the handbillers stood. On the other hand the entire parking lot (including the part near the store entrance), being designed to be accessible and to attract the public to the store, has ''quasi-public characteristics'' (*Jean Country*, supra at 15).

The General Counsel points to the fact that the Respondent routinely permits about a half-dozen charitable and civic organizations to use the parking lot each year for fundraising purposes—organizations like the Port Clinton Band Booster Club. But those organizations invariably first obtain the store manager's approval, the Respondent limits the duration of each organization's use of the parking lot to a few days per year, and in the Respondent's judgment allowing such organizations to use a portion of the parking lot for a limited period of time enhances the attractiveness of the store to the members of the Port Clinton community.

While I recognize that in *Jean Country* the Board did take into account the property owner's willingness to allow charitable organizations to use the property (id. at 15), under the circumstances present here I conclude that the Respondent's policy of allowing charitable and civic groups limited use of the parking lot for fundraising purposes ''does not significantly diminish the strength of the property right asserted.'' *Sentry Markets*, 296 NLRB 40 (1989), enfd. 914 F.2d 113 (7th Cir. 1990).

[4] I will hereafter refer to that case simply as *Jean Country*.

[5] See *Best Co.*, 293 NLRB 845 (1989). The Board, in finding a violation where employers prevented two union locals from handbilling the employers' stores to protest the employer's having remodeling work done by nonunion contractors, noted that the unions ''believed'' that the contractors ''paid below the area standards.''

The Availability to the Union of Reasonably Effective Alternative Means for Communicating its Messages[6]

The majority of people who entered or left the store while the Union's pickets were there passed close enough to the pickets to be able to read the signs. And just about anyone entering the store could at least see that there were pickets standing at the corner of Monroe and Perry Streets. (The pickets' corner is about 200 feet from the entrance to the store. The pickets could generally be seen from inside the store, through the large window at the front of the store. But large vehicles parked between the store and the corner could interrupt the line of sight between the store and the pickets.)

Since Port Clinton is a relatively small community (population: about 7000) not closely tied to any urban area, the picketing of the Great Scot store had to have been a significant topic of conversation among the citizens of Port Clinton. It is thus hard to imagine that anyone heading for the store on the days that the pickets were at the street corner next to the store's parking lot could have come away not being aware of the Union's position as stated on the picket signs.

That means that the Union did not have to enter upon the Respondent's property to make known to its intended audience as many facts as could conveniently fit on a picket sign or two.

But the Union's handbills were not merely scaled-down versions of the picket signs. Unlike the picket signs, the handbills claimed: that other stores were operated by the owner of the Port Clinton Great Scot; that the employees of those other stores have been ''protected by a union contract'' ''for 20 years or more''; that the owner ''decided to use profits generated by hardworking Union members'' at their unionized stores ''and open a non-Union, low wage Great Scot store in Port Clinton, as well as non-Union, Sack'n Save's in other cities''; and that the owner's ''objective'' was to ''bust this area's wage and benefit standards and maximize profits.'' In addition, the handbills were specific about where the Union wanted Port Clinton supermarket customers to shop: at the Foodtown and Kroger stores.

Unlike the picket sign situation, the handbills could not be effectively distributed anywhere but near the entrance to the store.

Safety was not the problem. The streets surrounding the store's parking lot are not crowded, and the speed limit on them is relatively low (25 miles per hour). Cars enter any given entrance to the parking lot only sporadically, so that a car's stopping at an entrance to the lot (in order for the driver to receive a handbill) would not ordinarily affect other vehicles. The same is true of vehicles leaving the parking lot. Nothing about the circumstances on the public property bordering on the parking lot hazards pickets or handbillers standing there.

The Union's need to station the handbillers near the store entrance instead stems from the numerous entrances onto and exits from the parking lot and from the fact that it is hard to get motorists to accept handbills.

As touched on earlier, and as the diagram in appendix A shows, the parking lot is on a corner and thus bounded by two streets (treating Perry Street Extended as though it really were part of Perry Street). There is no curb separating the parking lot and the streets. So vehicles and pedestrians can enter or leave the parking lot anywhere along those streets. Under the circumstances, the Union would have needed perhaps a dozen handbillers on station around the perimeter of the parking lot to be reasonably sure of having a handbiller close to every car or pedestrian entering or leaving the parking lot. And having that many handbillers near the store would present a variety of problems, including that of enmeshing Goodyear in the dispute between the Union and the Respondent.

Beyond that, motorists are less likely to accept handbills than are pedestrians.

As a result of these factors, when the Union removed the handbillers from the parking lot, in response to the court order discussed earlier, the rate at which the Union was able to hand out handbills plummeted.[7]

As a last matter, the Respondent argues that other alternatives were available to the Union—a ''phone bank,'' for instance, or the use of mass media, or delivering printed messages house-by-house in Port Clinton. But the Board has now made it clear that those means of communication will be considered reasonable alternatives for a union only in exceptional circumstances.[8]

Did the Union Have the Right to Handbill Near the Entrance to the Great Scot Store

In *Tecumseh Foodland*, 294 NLRB 486 (1989), the union crowded five handbillers into a small area near a store's entrance in such a way as to impede access to the store. Because the handbillers, together with the picket signs they were carrying, presented an obstruction to entry to the store, the Board concluded that the store owner lawfully threatened to summon the police.

But the Board made it clear that had the union limited the handbilling ''to one or two pickets . . . near the store's doors,'' the Board would have found that the owners' threats constituted a violation of the Act. That's because—

> we find that the Union's message here was primarily intended to benefit union members employed elsewhere but did have a potential to benefit the Respondent's employees, that the message was directed at a diverse population consisting of the Respondent's customers, which was not readily identifiable, and that this audience could not reasonably be reached by direct personal contact, telephone, or mail. We likewise agree that it would not be reasonable to insist that the Union undertake the burden and expense of a public media campaign. *Tecumseh Foodland*, supra at 487.

In the case before us here: (1) the Union placed a maximum of two handbillers near the store entrance; (2) the handbillers did *not* carry picket signs; (3) the handbillers at no time impeded anyone's access to the store; and (4) the

[6] ''[I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.'' *Jean Country*, supra at 14.

[7] For a case referring to the Union's success rate in passing out handbills, see *Sentry Markets*, supra.

[8] See id. at 49. (In any event the Union here did attempt, unsuccessfully, to deliver messages house-by-house.)

Union had no reasonable alternative means of delivering the handbills' message to the ''diverse population consisting of Respondent's customers.'' And while the handbillers did impinge on the Respondent's property rights, the importance of that factor is limited by the nature of the property. Following *Tecumseh Foodland*, I conclude that the Act entitled the Union to station its handbillers on the Respondent's property near the entrance to the Great Scot store. As for the Union's picketing, which was always on public property and which interfered in no respect with anyone, it obviously was protected by the Act.

That, however, is not the end of the matter. What is left is the determination of whether Respondent's actions regarding the handbillers and pickets impinged on the Union's rights.

The Respondent's Efforts to Rid Itself of the Handbillers and Pickets

The Store Manager's Request That the Handbillers and Pickets Leave

The only testimony on point regarding the Respondent's communications with the handbillers and pickets is that the store manager ''asked'' them to leave. (That testimony is quoted earlier in this decision.)

That raises the question of whether it is a violation of the Act for an employer merely to ask handbillers or pickets to go away—even assuming that the handbillers and pickets are entitled to be where they are. In all of the cases on point of which I am aware, the employer threatened the handbillers or pickets in some way, as by threatening to call the police (*Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990); *Thriftway Supermarket*, 294 NLRB 173 (1989); *W. S. Butterfield Theatres*, 292 NLRB 30 (1988)), by referring to rules that purportedly precluded the Union's activity (*Jean Country*, supra), or by demanding that they leave (*Best Co.*, 293 NLRB 845 (1989); *Mountain Country Food Store*, 292 NLRB 967 (1989); *D'Alessandro's, Inc.*, 292 NLRB 81 (1988)).

All things considered, it seems to me that reasonable employees would not deem themselves to be interfered with, restrained, or coerced in the circumstances facing the Union's handbillers and pickets when Rutkowski asked them to leave. I thus conclude that that asking did not violate the Act.[9]

The Store Manager's Summoning of the Police

As discussed earlier, Union Staffer Sadowski testified that a police officer advised him that the store manager told the police that he wanted the handbillers ''off the property.'' (The Respondent does not contend that the store manager did not make that request of the police.) The police, however, told the manager that they would not act against the handbillers without a court order.

The question here is whether the manager's summoning the police was itself a violation of the Act, or whether there was no violation because the police did not in fact take any action against the handbillers.

There is a Board ruling that seems on point. In *W. S. Butterfield*, above, the police, called to the scene by a theatre owner, told agents of a union who were picketing on the theatre's property that they could remain where they were. The Board's order in the case prohibits the respondent from ''requesting the . . . police to remove those [union] representatives.'' (*W. S. Butterfield*, supra at 35.) I accordingly conclude that by the store manager's attempt to have the Port Clinton police remove the handbillers from the Respondent's property, the Respondent violated Section 8(a)(1) of the Act.

The court action

The Respondent began a trespass action against the Union on November 2, 1988, in the Ottawa County, Ohio, Court of Common Pleas (the court). The Respondent concurrently asked for a T.R.O. and a preliminary injunction. The court forthwith granted the T.R.O. The order enjoined the Union from trespassing on Great Scot's premises and limited the Union to four ''stationary'' pickets, on public property, two on each side of the main entrance to the Great Scot parking lot.

The next day, November 3, the Union filed its unfair labor practice charge with the Board and immediately filed a motion with the court seeking dismissal of the state court action on the ground that the court's jurisdiction had been preempted by the filing of the charge.

Three weeks later the court conducted an evidentiary hearing on the Respondent's motion for a preliminary injunction and heard oral argument on the Union's motion to dismiss. The record does not include the pleadings that the parties submitted to the court. But the Respondent must in the very least have asked the court to continue in force the restrictions on the Union imposed by the T.R.O. I draw that conclusion because on December 12, 1988, the court issued a preliminary injunction that did indeed continue in force the restrictions imposed by the T.R.O. The court's order did not address the preemption question.

In November 1990 the Respondent and the Union waived a hearing on the question of whether a permanent injunction should issue against the Union. But both parties submitted briefs on the matter. On January 30, 1991, the court issued an order granting Respondent's application for a permanent injunction that converted the T.R.O. into a permanent injunction and that restrains the Union ''from trespassing on [the Respondent's] property or otherwise interfering in any way with [the Respondent's] business.''

The Union did not file an appeal.

Giant Food Stores, 295 NLRB 330 (1989), concerns, inter alia, the institution of a state court action in which the employers sought to enjoin a union's area standards picketing of a supermarket on the property of the shopping center in which the supermarket was located. The General Counsel contended that the employers thereby violated Section 8(a)(1).

The state court action there was still underway when the Board considered the matter. Nonetheless the Board noted ''if the state court ultimately finds merit in the employer's suit, the employer should also prevail before the Board be-

[9] I note that in *Sentry Markets*, supra, the employer ''asked [the handbilling strikers] to leave.'' Then, when they did not, the employer summoned the police. The Board's order requires the employer to cease and desist only threatening arrest, not asking the handbillers to leave. I note also that the General Counsel's argument on brief does not specifically contend that Kutkowski's asking the handbillers and pickets to leave violated the Act. See G.C. Br. at 26–27.

cause the filing of a meritorious lawsuit . . . is not an unfair labor practice.'' Id. at 333. In so concluding, the Board relied chiefly on *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

The General Counsel asked the Board to reconsider its ruling in *Giant Foods*, as did the charging party in that case. The heart of the motions for reconsideration was the contention that the Board misapplied *Bill Johnson's*. As stated by the Board's order denying motions in *Giant Foods*, 298 NLRB 410 (1990), the contention of the General Counsel and the charging party was that—

> *Bill Johnson's Restaurants* . . . does not apply to the [*Giant Foods*] case because the state court lawsuit that forms the basis of the alleged violation was preempted by the Act. As support for their claim . . . they cite footnote 5 of *Bill Johnson's*.

The Board denied the motions for reconsideration (Chairman Stephens dissenting). Interestingly, the Board did not deny the motions on the merits. Rather, the denials were based on the fact that the parties had not presented those contentions to the Board in timely fashion.

I, of course, am bound by the Board's decision in *Giant Foods*. But as I understand the position of the General Counsel and the Union here, they urge me, essentially, to conclude that the Board would have resolved *Giant Foods* differently if the Board had there considered preemption matters in general and footnote 5 of *Bill Johnson's* in particular.

In view of the current state of the law and the facts of this case, however, I decline the invitation. Rather, because the litigation in the Ottawa County Court ended with rulings in the Respondent's favor, I follow the Board's decision in *Giant Foods* and conclude that the Respondent did not violate the Act either by instituting or by maintaining that state court action.

Disparate Treatment

In *D'Alessandro's, Inc.*, 292 NLRB 81 (1988), the Board held that where an employer discriminatorily posts its property against nonemployee union solicitation, a ''disparate treatment'' analysis should be used that focuses on the respondent's discriminatory conduct. The General Counsel argues that since the Respondent permitted charitable and civic organizations to solicit on the store's property, *D'Alessandro's* applies. But since my conclusions here, based on a *Jean Country* analysis, are at least as favorable to the General Counsel as any conclusion based on a disparate treatment analysis could be, I need not reach the question of whether, under a disparate treatment analysis, the Respondent violated the Act.

The Remedy

The usual remedy would, essentially, require the Respondent to refrain from summoning the police in response to handbilling by the Union near the entrance to the store (where the handbillers were located when the Respondent called the police).

But the Respondent argues that the usual remedy should not apply. According to the Respondent, even if a violation of the Act is found, a proper accommodation of the Union's protected activity, on the one hand, and Respondent's property rights, on the other, requires that the Respondent be permitted to demand that union representatives handbill at a location farther from the entrance to the store. ''[T]here is no evidence,'' the Respondent urges, ''that the location immediately outside the customer entrance to the Great Scot store represents the *only* location from which the union's activity can reasonably and effectively conducted.'' (Br. at 37, emphasis in the original.)

But as the location of the handbilling got farther from the doors to the store, more handbillers would be needed to ensure that each prospective customer was offered a handbill. And I find, based on the considerations discussed earlier, that the Act protects the Union's effort to make an effective offer of a handbill to each prospective customer. The better course, it seems to me, is to permit the handbillers to use any location on the store's parking lot that the Union chooses, but to limit the number of handbillers to a maximum of two and to specify that the handbillers not block egress or ingress.

The Respondent also urges that if the Board's decision turns on the Respondent's disparate treatment of the Union relative to other organizations, then the Respondent should be permitted to limit the duration of the handbilling. (As noted earlier, the record shows that the store limits soliciting on its property by charitable and civic organizations to a few days per organization per year.) But as discussed above, my conclusion that the Respondent violated the Act does not hinge on a disparate treatment analysis.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Great Scot, Inc., Clinton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) In the case of peaceful handbilling on the Respondent's property in front of the Respondent's store in Port Clinton, Ohio, by a maximum of two representatives of the United Food and Commercial Workers, Local 954, who are neither blocking ingress into or egress out of the store, asking the police to remove such representatives from the Respondent's property.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post in the Respondent's Port Clinton store copies of the attached notice marked ''Appendix B.''[11] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.